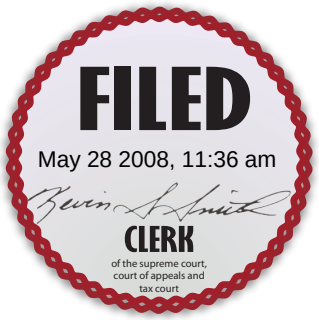

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IN THE
COURT OF APPEALS OF INDIANA

IN RE: THE MATTER OF THE TERMINATION OF THE PARENT-CHILD RELATIONSHIP OF H.S.,	)	
THOMAS SMITH and SHEILA SMITH,	)	
Appellants,	)	
vs.	)	No. 89A04-0712-JV-735
WAYNE COUNTY DEPARTMENT OF CHILD SERVICES,	)	
Appellee.	)	

APPEAL FROM THE WAYNE SUPERIOR COURT
The Honorable Darrin M. Dolehanty, Judge
Cause No. 89D03-0707-JT-005

May 28, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Thomas and Sheila Smith appeal the termination of their parental rights to their daughter, H.S. We affirm.

Issue

The Smiths raise two issues, which we combine and restate as whether there is sufficient evidence to support the termination of their parental rights.

Facts

H.S. was born on April 9, 2006, at twenty-eight weeks gestation. In addition to being very premature, H.S. also has a hole in her heart and suffers from an eye disorder and is at risk for developing cerebral palsy in the future. H.S. must attend physical, developmental, and occupational therapy on a regular basis. She has been on as many as six medications at one time.

Thomas and Sheila both have mental disabilities. Thomas has been diagnosed with bipolar schizophrenia that requires constant medication. Because of his suicidal tendencies an adult services team brings his medications to him. Thomas also contracted spinal meningitis as a child, causing brain damage. Sheila has epilepsy and mental retardation, with a full scale IQ of 49. She also has attempted suicide on at least three occasions, and is supposed to take lithium.

The hospital where H.S. was placed in the neonatal intensive care unit ("NICU") arranged for the Smiths to stay in a hotel near the hospital and for a shuttle bus to transport them between the hospital and hotel. The Smiths frequently had trouble

determining how to use the bus. They also sometimes were seen wandering inside the hospital, lost. There were concerns from hospital staff about the Smiths' very poor personal hygiene, and their apparent inability to understand instructions regarding H.S.'s care. For example, Sheila was told not to feed her breast milk to H.S. because of the medications Sheila was taking. After being told this, however, Sheila came to the hospital with un-refrigerated breast milk that she wanted to give to H.S. Although the Smiths could give H.S. a bottle, they could not remember how often they were supposed to feed her. Eventually, the hospital had to devise special visitation rules for the Smiths, which included reminding them that they had to bathe and eat regularly.

Because of concerns about the Smiths and their ability to care for a special needs child, on June 9, 2006, while H.S. was still hospitalized, the Wayne County Department of Child Services ("DCS") filed a petition seeking to have H.S. declared a child in need of services ("CHINS"). On June 24, 2006, H.S. was released from the hospital to the care of a foster parent, Jennifer Shaffer, and H.S. has been in her care ever since. On July 26, 2006, H.S. was found to be a CHINS.

On July 9, 2007, the DCS filed a petition to terminate the Smiths' parental rights. The trial court conducted a hearing on the petition on November 1 and 5, 2007. The DCS presented evidence that although the Smiths were instructed to attend all of H.S.'s therapy sessions, they had missed a total of fifty-five such sessions. The Smiths also continued to have difficulty with their own personal hygiene, with some caseworkers observing that they would wear the same clothes over the course of a week, with their body odor becoming progressively worse.

Various caseworkers and counselors related that despite repeated instructions to the Smiths regarding proper parental care, they failed to consistently retain much of the information. This was especially true of Sheila, who tended to be belligerent and, in fact, threatened caseworkers and counselors, saying things such as she would "sick" her father on them. Tr. 1, p. 123.[1] She missed numerous counseling appointments. During one meeting with counselors and case managers, Sheila left the meeting and began banging her head against a wall, saying she "had to readjust [her] brain." Id. at 66.

Thomas did make more of an effort to learn and apply proper parenting skills, and to care for H.S. during supervised visits. Caseworkers and counselors were concerned, however, that Sheila was very domineering and Thomas was submissive to her; thus, there was a fear that Sheila would overrule Thomas in making decisions regarding H.S.'s care. Thomas also threatened a case manager by saying he would "pay for every bullet" to hit her. Id. at 57.

The DCS never approved unsupervised visitation for the Smiths. During one supervised session, while the supervisor was watching from a different room, Thomas pulled apart H.S.'s legs and Sheila took a photograph of H.S.'s vagina with her cell phone. Thomas told a counselor that they had taken the picture so they could embarrass H.S. with it later in life. The Smiths were unable to learn how to mix formula to bottlefeed H.S. and, although they could feed her pre-prepared formula, they had to be reminded during supervised visits when it was time to feed her. At one point, supervised

[1] There are two separately-paginated transcripts, with the first being for the November 1 hearing and the second for the November 5 hearing.

visitation was suspended because the Smiths had head lice, and they attempted to forge a note from a medical clinic saying that the condition had been remedied.

The Smiths had another child who was born prematurely in August 2007. This child was placed in the same NICU where H.S. had been, and was cared for by the same nurse. This nurse related that she saw no improvement in the Smiths' apparent parenting skills between the time of H.S.'s hospitalization and the new baby's hospitalization. A caseworker expressed concern that the Smiths would be unable to keep track of H.S.'s many medications.

Numerous caseworkers and counselors testified as to the Smiths' lack of progress in services provided to them, and that they believed termination of their parental rights was in H.S.'s best interests. One person who had supervised some of the Smiths' visitation with H.S. during the last three months before the termination hearing testified that he believed the Smiths "have the capacity to keep [H.S.] alive." Tr. 2, p. 12. On November 7, 2007, the trial court entered an order, with findings and conclusions, terminating the Smiths' parental rights. They now appeal.

Analysis

"The traditional right of parents to establish a home and raise their children is protected by the Fourteenth Amendment of the United States Constitution." In re M.B., 666 N.E.2d 73, 76 (Ind. Ct. App. 1996), trans. denied. However, these parental interests are not absolute and must be subordinate to the child's interests in determining the proper disposition of a petition to terminate parental rights. Id. Parental rights may be terminated when the parents are unable or unwilling to meet their parental

responsibilities. In re L.S., 717 N.E.2d 204, 208 (Ind. Ct. App. 1999), trans. denied, cert. denied. The purpose of terminating parental rights is not to punish parents but to protect children. In re D.D., 804 N.E.2d 258, 264-65 (Ind. Ct. App. 2004), trans. denied.

In reviewing the termination of parental rights, we will not set aside a trial court's judgment unless it is clearly erroneous. Castro v. State Office of Family & Children, 842 N.E.2d 367, 372 (Ind. Ct. App. 2006), trans. denied. Where, as here, the trial court issues findings and conclusions, we first determine whether the evidence supports the findings, and then we determine whether the findings support the judgment. Id. "'A judgment is clearly erroneous if the findings do not support the trial court's conclusions or the conclusions do not support the judgment.'" Id. (quoting Bester v. Lake County Office of Family & Children, 839 N.E.2d 143, 147 (Ind. 2005)). When reviewing a termination of parental rights, we neither reweigh the evidence nor judge the credibility of witnesses. Id. Instead, we consider only the evidence and reasonable inferences drawn therefrom that are most favorable to the judgment. Id.

Indiana Code Section 31-35-2-4(b)(2) provides that a termination petition must allege that:

> (A) one (1) of the following exists:
>
> (i) the child has been removed from the parent for at least six (6) months under a dispositional decree;
>
> (ii) a court has entered a finding under IC 31-34-21-5.6 that reasonable efforts for family preservation or reunification are not required, including a description of the court's finding, the date of the finding, and the manner in which the finding was made; or

> (iii) after July 1, 1999, the child has been removed from the parent and has been under the supervision of a county office of family and children for at least fifteen (15) months of the most recent twenty-two (22) months;
>
> (B) there is a reasonable probability that:
>
> (i) the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied; or
>
> (ii) the continuation of the parent-child relationship poses a threat to the well-being of the child;
>
> (C) termination is in the best interests of the child; and
>
> (D) there is a satisfactory plan for the care and treatment of the child.

If the trial court finds that the allegations in a petition are true, it shall terminate the parent-child relationship. See Ind. Code § 31-35-2-8(a). The DCS must prove these allegations by clear and convincing evidence. Bester, 839 N.E.2d at 148. "Clear and convincing evidence need not reveal that the continued custody of the parents is wholly inadequate for the child's very survival. Rather, it is sufficient to show by clear and convincing evidence that the child's emotional and physical development are threatened by the respondent parent's custody." Id. (quotations and citations omitted).

The Smiths first alleged that the DCS failed to reasonably accommodate their mental disabilities in providing services to them, in violation of the Americans with Disabilities Act ("ADA"). It is true that when a DCS provides services during a CHINS proceeding to disabled parents, such provision must comply with the ADA. See Stone v. Daviess County Div. of Children and Family Servs., 656 N.E.2d 824, 830 (Ind. Ct. App.

1995), trans. denied. This requirement is met if the DCS reasonably accommodates a parent's disability. Id.

Additionally, a parent's parental rights may not be terminated solely on the basis of his or her mental disability. See R.M. v. Tippecanoe County Dep't of Pub. Welfare, 582 N.E.2d 417, 420 (Ind. Ct. App. 1991). However, "[a] parent's abilities, including intellect, as they relate to the parent's capacity to provide for the needs of the child, are relevant factors to be weighed in a termination proceeding." Id. "Every child is entitled to a minimum level of care regardless of the special needs or limited abilities of its parents. In the final analysis, the rights of the parents under the Fourteenth Amendment and the ADA must be subordinated to the protected rights of the children." Stone, 656 N.E.2d at 831.

Here, there was testimony from several caseworkers and counselors that, being aware of the Smiths' mental disabilities, they would repeatedly provide necessary information to them. However, with the exception of CPR and first aid training, the Smiths failed to retain the information. The Smiths seem to argue that repetition of information was not a reasonable accommodation of their disabilities. However, they failed to present any evidence to the trial court of what should have been done differently, nor do they explain to this court what should have been done. We will not speculate that there must have been something else the DCS should have done differently.

Moreover, we do not believe the trial court terminated the Smiths' parental rights simply because of their mental disabilities. Rather, it is clear that the trial court considered the Smiths' inability to improve their parenting skills over the course of

nearly one and a half years. The mere fact this inability might have been directly related to the Smiths' disabilities does not, by itself, warrant reversal of the termination of their parental rights.

Turning to the merits of the trial court's termination decision, it specifically found that the conditions that resulted in the removal of H.S. from the Smiths' care would not be remedied. The original CHINS petition, filed while H.S. was still hospitalized, alleged generally that the Smiths lacked the capacity to care for her, especially as a premature infant. They were unable to retain and learn the necessary skills to care for her, with respect to such things as how often she needed to be fed.

There is ample evidence in the record that despite the attempted provision of services to the Smiths, their ability to care for H.S. was not significantly improved. Despite the fact that H.S. requires much therapy and the Smiths were directed to attend all of her therapy appointments, they missed a total of fifty-five appointments. There was concern that the Smiths would be unable to monitor H.S.'s medications. During supervised visitation, the Smiths had to be reminded of when it was time to feed H.S. The Smiths also exhibited bizarre behavior, such as the incidents when they photographed H.S.'s exposed vagina and when Sheila began banging her head against a wall.

The Smiths also continued to exhibit extremely poor personal hygiene. It is reasonable to infer that this inability to properly care for themselves could or likely would extend to H.S. Sheila, in particular, failed to attend many required counseling sessions and often was defiant and verbally abusive to counselors and caseworkers. Although

Thomas did somewhat better in this regard, Sheila had a tendency to cow Thomas into submission, which clearly could be unhealthy to H.S.

Multiple caseworkers and counselors testified as to the Smiths' generally inability to improve their parenting skills, despite repeated efforts to teach them. Most telling, perhaps, is the testimony of the NICU nurse, who had much interaction with the Smiths during H.S.'s hospitalization and the hospitalization of their subsequent child over a year later. She said she saw no change in their ability to handle stressful situations or in their parenting skills at the time of the second baby's hospitalization.

The Smiths emphasize the testimony of one witness who said he believed they "have the capacity to keep [H.S.] alive." Tr. 2, p. 12. It is not clear that this testimony is consistent with that of numerous other counselors and case managers who expressed grave doubt as to the Smiths' ability to care for H.S. We must consider only the evidence most favorable to the trial court's ruling. See Castro, 842 N.E.2d at 372. Even so, the bare ability to keep a child alive is not enough to avoid a termination of parental rights, if there is clear and convincing evidence that the child's emotional or physical development would be threatened by parental custody. See Bester, 839 N.E.2d at 148. There is such evidence here.

The Smiths also assert that termination is not in H.S.'s best interests. We disagree. Not only is there ample evidence that the Smiths would be unable to properly care for H.S., but Shaffer, her foster mother, has been diligent in caring for her for over a year and providing the special care she needs. Additionally, Shaffer and her husband wish to

adopt H.S. There is clear and convincing evidence that termination of the Smiths' parental rights is in H.S.'s best interests.

Conclusion

The Smiths have not demonstrated that the DCS failed to reasonably accommodate their mental disabilities, and there is sufficient evidence to support the termination of their parental rights. We affirm.

Affirmed.

CRONE, J., and BRADFORD, J., concur.